No. 75-1215

In the Supreme Court of the United States

OCTOBER TERM, 1975

ABRAHAM E. FREEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 529 F.2d 543. The opinion of the district court (Pet. App. C) is reported at 399 F. Supp. 668.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1976. A petition for rehearing with suggestion of rehearing *en banc* was denied on February 4, 1976 (Pet. App. A1). The petition for a writ of certiorari was filed on February 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a member of a law partnership is entitled to invoke his Fifth Amendment privilege against self-

incrimination as a ground for refusing to comply with a grand jury subpoena for financial records of the partnership.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * * .

STATEMENT

On June 16, 1975, a grand jury of the United States District Court for the District of New Jersey issued a subpoena *duces tecum* to the law firm of Freedman, Borowsky and Lorry, directing "any responsible officer" of the firm to produce various specified financial records of the partnership over the previous eleven years.[1] Petitioner, a partner in the law firm, moved to quash the subpoena on July 11, 1975, alleging that the subpoena was unconstitutionally overbroad and that there had been no showing that the subpoenaed documents were relevant to any investigation over which the grand

[1]The subpoena directed production of the following partnership documents for the period from January 1, 1964, to June 13, 1975: general ledgers, general journals, cash disbursement journal, petty cash books and vouchers, purchase journals, vouchers, paid bills, invoices, cash receipts journal, billings, bank statements, cancelled checks and check stubs, payroll records, contracts and copies of contracts, including all retainer agreements, financial statements, bank deposit tickets, retained copies of partnership income tax returns, retained copies of payroll tax returns, accounts payable ledger, accounts receivable ledger, telephone company statement of calls and telegrams and all telephone toll slips, records of all escrow trust or fiduciary accounts maintained on behalf of clients, safe deposit box records, records of all purchases and sales of stocks and bonds, a complete list of all partners, associates and employees, together with their home addresses, and all W-2 forms for each partner, associate and employee (Pet. App. A3, A30).

jury had jurisdiction. In response, the government submitted an affidavit disclosing that the grand jury was investigating alleged criminal violations by a client of the firm, the National Maritime Union (NMU), and by the union's officers and employees (Pet. App. A3).

On July 14, 1975, the district court denied petitioner's motion to quash and directed him to produce the subpoenaed records on the following day. Petitioner was not ordered to testify. Although petitioner appeared before the grand jury on July 15, he refused to produce the records on the ground that such production would violate his Fifth Amendment privilege against self-incrimination. The government thereupon moved to hold petitioner in civil contempt, and the district court scheduled an evidentiary hearing for July 23, 1975 (Pet. App. A4-A5).[2]

After the evidentiary hearing, the district court concluded that the subpoenaed records belonged to the law firm of Freedman, Borowsky and Lorry, an institutional entity separate and distinct from its members, and were held by petitioner not as his personal and private effects but in a representative capacity for the entity (Pet. App. A38). Petitioner again was ordered to produce the records before the grand jury on August 12, 1975 (Pet. App. A40). When petitioner refused on that day to comply, the court ordered that he show cause why he should not be held in contempt. Following a full hearing on September 8, 1975, the district court adjudged petitioner in civil contempt and ordered him imprisoned and

[2]The court also ordered petitioner to produce the subpoenaed records for an *in camera* inspection. When petitioner failed to comply, he was held in civil contempt. On July 22, 1975, the court of appeals summarily reversed the contempt adjudication and the order requiring *in camera* inspection, without prejudice to the government's right to reinstitute contempt proceedings following the evidentiary hearing (Pet. App. A5, n. 3).

fined $1,500 per day until he produced the documents. The order was stayed by the district court pending appeal.

The court of appeals vacated and remanded. Although it rejected petitioner's claims that he had a Fifth Amendment privilege to refuse production and that the government's showing of relevancy of the records relating to the National Maritime Union had been insufficient, the court held that there had been an inadequate explanation of the grand jury's need for financial records relating to other clients of the firm (Pet. App. A6-A10). The order adjudging petitioner in civil contempt was therefore vacated and the case remanded to the district court to afford petitioner an opportunity to furnish the materials relating to the NMU and to allow the government to demonstrate the relevancy of the other materials to the grand jury's investigation (Pet. App. A16).

ARGUMENT

1. In *Bellis* v. *United States*, 417 U.S. 85, the Court held that the Fifth Amendment privilege against self-incrimination was not available to a member of a law partnership which had "an established institutional identity independent of its individual partners" (417 U.S. at 95), where a subpoena had sought financial records of the firm that were held by the member in a representative capacity (*id.* at 97). The court of appeals correctly concluded (Pet. App. A7) that "Freedman, Borowsky & Lorry possesses an identity separate and distinct from that of the petitioner," that the records subpoenaed were held by petitioner as a representative of the law firm, and that *Bellis* therefore controls the situation here.

The facts adduced at the evidentiary hearing indicate that, during the period covered by the subpoena, Freedman, Borowsky and Lorry was one of the largest maritime

and admiralty law firms in the United States, with offices in Philadelphia and New York (F.F. 17, 19).[3] It consisted of twelve profit-sharing members (each of whom contributed capital to the firm), nine associate attorneys, and approximately fifty other employees, including three bookkeepers who maintained the firm's financial and other records (F.F. 18-19, 30, 84). From 1970 to 1972 the firm's total billings exceeded $10 million (F.F. 45).

In addition, the firm filed both federal and state partnership tax returns and held itself out to the public, the courts, and the legal profession as a partnership (F.F. 3-8, 10, 18, 56-57, 67, 74, 85); it maintained bank accounts in the partnership name, used that name on its stationery and retainer agreements, and accepted payments in that name for legal services performed by its members (F.F. 29, 34, 36, 44); ordinary operating expenses, other business expenses, charitable contributions, legal malpractice, medical and life insurance premiums, workmen's compensation insurance, and local taxes were paid from the firm's account (F.F. 42, 47-52, 78-82); and depreciation on the firm's assets was divided proportionately among all of the profit-sharing members of the firm (F.F. 77). These findings clearly reflect that petitioner's law firm was "an independent entity apart from its individual members," *Bellis* v. *United States, supra*, 417 U.S. at 92, and that it was "well organized and structured" and "maintain[ed] a distinct set of organizational records (*id.* at 93).

Petitioner contends (Pet. 8), however, that "*Bellis* makes access [to the subpoenaed records] one of two essential prerequisites to overruling a claim of privilege, and requires unequivocally that the organization '*must*

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[3] "F.F." refers to the district court's enumerated Findings of Fact (Pet. App. A19-A32).

. . . recognize rights in its members of control and access to them.' " We disagree. The critical question under *Bellis* is whether, having found the existence of a separate institutional entity, the subpoenaed documents should be considered personal papers of a member of the entity rather than organizational records of that entity held only in a representative capacity. 417 U.S. at 88. While the recognition or denial of a right of access to the records by other members of the entity may be relevant to that determination, the more important factor is the nature of the records themselves.

Here, as in *Bellis*, the documents demanded were "merely the financial books and records of the [law firm]," which "reflect[ed] the receipts and disbursements of the entire firm * * * ." 417 U.S. at 98. Notwithstanding petitioner's claim of his exclusive access to these records—a claim that is disputed by the district court's findings that the firm's bookkeeper had an access key and that members of the firm were given access to the ledger sheets of the cases they were handling (F.F. 32, 33)—these impersonal financial records of an extensive business enterprise cannot be characterized as petitioner's private papers. See *Bellis* v. *United States*, *supra*, 417 U.S. at 97-98. Indeed, petitioner's exclusive focus on the right of access, regardless of the size or structure of the business entity or the nature of the documents involved, would allow any unincorporated association to shield its organizational records from grand

jury subpoenas merely by limiting unrestricted access to its records to a single individual.[4]

Nor is there merit to petitioner's suggestion (Pet. 9-10) that the existence of an independent entity is dependent upon a state charter or formal operating agreement. Not only was the adoption of such an agreement not a consideration in *Bellis*, but the record in that case was unclear as to whether a formal partnership agreement even existed. See *Bellis* v. *United States*, *supra*, 417 U.S. at 96, n. 4. See also *United States* v. *Kuta*, 518 F.2d 947, 953 (C.A. 7), certiorari denied, December 8, 1975 (No. 75-307), where a partner's Fifth Amendment claim was rejected despite the absence of a formal partnership agreement.

2. Finally, in light of events that have transpired subsequent to the court of appeals' vacation of petitioner's civil contempt adjudication and its remand to the district court for further proceedings, review of the instant case would be inappropriate at this time.

On the basis of the evidence offered at the hearing held on July 24, 1975, the district court had substantially accepted petitioner's claim of exclusive access to and control over the firm's records, although ruling that this did not suffice to sustain the claim of privilege. In

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[4]In any event, even if petitioner could establish that the subpoenaed documents were his personal records rather than those of a separate institutional entity, he would still have no Fifth Amendment privilege to refuse production in view of *Fisher* v. *United States*, No. 74-18, decided April 21, 1976. Petitioner does not contend that he personally prepared any of the financial records of the firm or that the subpoena would require him to "restate, repeat or affirm the truth of the contents of the documents sought." Slip op. 17. Indeed, the district court found that petitioner "does not know or is unsure of what types of financial books and records are maintained by the law firm of Freedman, Borowsky and Lorry" (F.F. 31).

February and March 1976, however, seven members of Freedman, Borowsky and Lorry withdrew from the firm and took firm records with them. Proceedings have now been begun in the district court to determine whether petitioner's testimony at the evidentiary hearing may have been inaccurate. These proceedings may compel the district court to alter its findings on petitioner's access and control over the records, which findings are the premise for petitioner's present claims.[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]Contrary to petitioner's contention (Pet. 14, n. 6), there is no reason to hold this case pending the Court's decision in *Andresen* v. *Maryland*, No. 74-1646, certiorari granted, October 6, 1975, or *Shaffer* v. *Wilson*, No. 75-601, petition for a writ of certiorari pending. *Andresen* presents the question whether the introduction into evidence of a person's books and records, seized in compliance with the Fourth Amendment, may nonetheless violate the Fifth Amendment. In *Andresen*, however, the law firm was a sole proprietorship and the government did not allege that the papers were held only in a representative capacity. Thus the Court's decision could not affect the disposition of this case in a way that would be favorable to petitioner.

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